

*United States Court of Appeals  
for the Second Circuit*



BRIEF FOR  
APPELLEE



# 76-6014

*To be argued by*  
V. PAMELA DAVIS

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United States Court of Appeals  
FOR THE SECOND CIRCUIT

Docket No. 76-6014

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KEITH D. GAINES,  
*Plaintiff-Appellant,*

—v.—

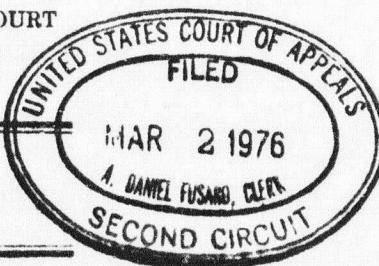
MARTIN R. HOFFMAN, Secretary of the Army and  
Superintendent, United States Military Academy,  
GENERAL SIDNEY BERRY,  
*Defendants-Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE DEFENDANTS-APPELLEES

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M-1015

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET No. 76-6014

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KEITH D. GAINES,

Plaintiff-Appellant

- v -

MARTIN R. HOFFMAN, Secretary  
of the Army and Superintendent,  
United States Military Academy,  
General Sidney Berry,

Defendants-Appellees.

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BRIEF FOR DEFENDANTS-APPELLEES

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STATEMENT

The plaintiff-appellant Keith D. Gaines ("Gaines") appeals from an Order entered in this action on January 13, 1976 by the Hon. John M. Cannella denying plaintiff's motion for a preliminary injunction. This action was instituted by Mr. Gaines for an order of mandamus and for a preliminary and permanent injunction. He sought to enjoin defendants from ordering him to active duty in the United States Army ("Army") and to require defendants to set aside their determination that Gaines must be separated from the

M-1015      United States Military Academy ("West Point") for violation of the Honor Code for failure by the defendants to observe due process of law in making that determination.

The action was brought on by Order to Show Cause made returnable by Judge Cannella on October 16, 1975. Defendants having agreed to voluntarily extend the deadline for Gaines to report for active duty in the Army until November 10, 1975, Judge Cannella set October 29, 1975 as the adjourned return date for plaintiff's motion for a preliminary injunction. By stipulation filed October 29, 1975, the return date was again adjourned to November 3, 1975 on which day the motion for a preliminary injunction was submitted. Defendants continued to voluntarily stay the Gaines reporting date until such time as Judge Cannella ruled upon the injunction motion.

By memorandum and order entered January 13, 1976, Judge Cannella denied the motion for a preliminary injunction for failing to raise "sufficiently serious questions going to the merits to make them a fair ground for litigation..." (Slip op. p. 1, A-1\*) Accordingly, Judge Cannella ordered Gaines to report for active duty on January 26, 1976. (Slip op. p. 13, A-13) and refused plaintiff's request for a stay pending appeal.

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\* The appendix to Appellant's Brief is referenced as "A" throughout.

The motion to stay the reporting date pending appeal of the denial of the preliminary injunction was granted by this Court on January 27, 1976. On that same day this Court expedited this appeal and waived the requirement of printed briefs.

ISSUES PRESENTED

1. Did the District Court abuse its discretion in denying a preliminary injunction for lack of probability of success on a claim:

a) that the West Point Cadet Honor Committee must make a specific finding of guilty on each separate charge before the Superintendent may refer such charge to a Board of Officers?

b) that a Board of Officers member is biased by knowledge of the finding of the Cadet Honor Committee?

c) that imposition of a requirement of three years active duty in the Army following separation from West Point just prior to graduation is a violation of due process?

THE APPLICABLE REGULATIONS

The Regulations of the Army which apply to all investigations are published at 32 C.F.R. 519.1 et seq. They provide broad outlines for the convening and conduct

of Boards of Officers and require that elaborate due process be a part of every Board of Officers determination.

The individual under investigation is entitled to written notice (32 C.F.R. 519.1(f)); to counsel (32 C.F.R. 519.1(h)); to the personal appearance of witnesses wherever possible (32 C.F.R. 519.1(e) (2)); to offer opposing and rebuttal evidence (32 C.F.R. 519.1(f)) and to written findings based upon substantial evidence (32 C.F.R. 519.3).

Subsection (a) of Regulation 519.1 provides for the controlling effect of Army regulations promulgated for specific types of investigations. In the case of West Point cadets, the Secretary of the Army has promulgated the regulations of the United States Military Academy pursuant to his authority under Section 3012(b) of Title 10, United States Code. These regulations (Set forth in part in the Appendix to Appellants Brief) govern all aspects of the operations of West Point including, at Article 12, the grounds for separation or other disciplinary action against a cadet, and, at Article 16, the procedures to be followed before separation may be ordered.

Section 12.14 of Article 12 provides:

The Cadet Honor Code states that a cadet will not lie, cheat or steal, nor tolerate those who do. A cadet who violates the Cadet Honor Code shall be separated from the Military Academy.

M-1015      Section 16.03 of Article 16 sets forth the procedures for separation. Pursuant to 32 C.F.R. 519.1, these regulations, promulgated by the Secretary of the Army, are controlling for disciplinary investigations at West Point.

16.03. PROCEDURES FOR COURT-MARTIAL,  
BOARD OF OFFICERS, OR RESIGNATION.

a. A cadet who is subject to separation or punitive action under the provisions of Article 12 of this Regulation, may, in the discretion of the Superintendent, be tried by court-martial if the conduct includes a violation of the Uniform Code of Military Justice, be brought before a board of officers convened by the Superintendent, or be permitted to resign in lieu thereof.

\*     \*     \*

c. If the cadet appears before a board of officers, the board shall consist of one colonel who shall be the president and at least two other field grade officers who shall be voting members. For good cause shown, the Superintendent may modify the grade restriction for the members. The board will make findings with respect to the matter under investigation and, if appropriate, will make recommendations concerning separation from the Military Academy, discharge from the Army, and the type of discharge. The board may consider the cadet's prior conduct and any part of his record of military service that it deems pertinent. The board will submit a report of its proceedings and its findings and any recommendations to the Superintendent. The Superintendent will prepare a proposed recommendation to Headquarters, Department of the Army.

Prior to the forwarding of the case to Headquarters, Department of the Army, the cadet concerned will be provided an opportunity to review all the relevant material in the file, including the Superintendent's proposed recommendation, subject to security standards and questions of privilege. The SJA review of the board proceedings is considered a privileged attorney-client communication, and will not be made available to the cadet concerned. The cadet will be permitted to rebut any adverse evidence and to submit any statement or relevant evidence he desires. His submission will be reduced to writing and incorporated into the file. The Superintendent should then reconsider his proposed adverse recommendation, in light of the submitted material, to determine whether Secretarial action is still believed appropriate. Should the cadet choose not to submit a statement or other evidence, or fails to do so within a reasonable time, the completed file should reflect that fact.

Section 16.04 provides for automatic review of the Board of Officers proceedings by the Department of the Army. Separation must be ordered by the Secretary of the Army.

Article 16 clearly provides that the decision to convene a Board of Officers to investigate an alleged Honor Code violation is within the discretion of the Superintendent of West Point. As explained in the uncontroverted affidavit of Major Daniel Shimek (A-18) a report of an alleged violation of the Code from the internal cadet committee, the Honor Code Committee, will, as a matter of practice, trigger an investigation by the Superintendent's legal staff. The

M-1015      Superintendent, then, in his discretion, will determine if it is necessary to invoke the mechanism which could ultimately result in separation. If so, pursuant to section 16.03(a), the cadet is offered the choice of resignation or administrative processing of the charge which commences with the hearing before the Board of Officers following notice of hearing and charges. Pursuant to section 16.03(d), the cadet may resign only with the permission of the Superintendent.

If the Superintendent should, in his discretion, determine that the allegations which were made by the Honor Code Committee do not justify punitive action then the matter is dropped and the case is closed.

The basic guidelines for the Cadets in the operation of their Honor Code Committee were promulgated by the Superintendent pursuant to his authority in 10 U.S.C. §4334. Basically, these regulations, (A-20 et seq.) reiterate the procedures discussed above for proceedings where the Superintendent accepts the Cadets' view that the charges have validity. The internal workings of the cadet committee are determined by the cadets themselves each year. The regulations governing the Cadet Committee which investigated Cadet Gaines are set forth at A-28 et seq.

STATEMENT OF FACTS

The following facts from the Record of the Proceedings of the Board of Officers\* are not disputed.

In April of 1975, Gaines was a West Point cadet in good standing, due to graduate in June pending satisfactory completion of the academic year. (R. 11, 24) On Wednesday April 30, 1975 he did not attend a morning class. (R. 118)

A classmate, Cadet Anderson, stopped by Gaines' room after the class to inquire into Gaines' absence. At the hearing before the Board of Officers, Cadet Anderson testified that Gaines informed him that Gaines had previously been excused from the class by the instructor. (R. 73) Although Gaines denied making this statement to Cadet Anderson, (R. 119, 131), the Board of Officers found that he had made the statement and that it was false, constituting a violation of the Honor Code. (R. 198).

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\* "R" will be used throughout to refer to the Record of Proceedings of the Board of officers submitted below as Exhibit B to the affidavit of V. Pamela Davis dated November 3, 1975, submitted in opposition to plaintiff's motion for a preliminary injunction.

Two days later, on May 2, 1975, the class was again scheduled to meet. Gaines attended and was questioned about his absence before the five other members of the class. (R. 90, 99, 103). The instructor, Capt. Hausman, testified before the board that Gaines replied that he was on a "concrete field trip". (R. 90)\* Although Gaines also denied this statement, (R. 121-2) the Board of Officers found that he had made the statement and that it was false, constituting a second violation of the Honor Code. (R. 198)

On May 13, 1975, the Cadet Honor Committee convened to consider allegations by Cadet Anderson that Cadet Gaines had violated the Honor Code. The report of these proceedings (R. 206-7) consisting of handwritten entries on a two page form, constitutes the only written record of the proceedings (A 14-15).\*\* Under "Explanation of Circumstances and Summary of Testimony" is handwritten the following:

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\* The testimony of two other class members corroborated this version of the conversation between Cadet Gaines and Capt. Hausman. (R. 99, 103).

\*\* The testimony before the Cadet Honor Committee was taped. Counsel for both sides listened to that tape on October 28, 1975 and argued that it established the accuracy of the Summary of Testimony on the form.

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Cdt. Gaines missed surveying class on Wed. 30 May. He was working on a concrete design project, and claims he was unaware that he had missed the class until asked by Rick Anderson, his section marcher, where he was. Anderson claims that Gaines indicated that CPT Hausman, his instructor had authorized the absence.

CPT. Hausman DENIED GIVING GAINES SUCH AUTHORIZATION.\*

Gaines turned in his paper Thurs. morning. He was asked Fri. by CPT Hausman (during the class period) why he was absent on Wed. Gaines allegedly replied that he was "on a concrete field trip" or words to that effect. This reply was verified by CPT Hausman, & Cdt. Johnigan (Sp.), Washachek, and Anderson, all of whom are members of Gaines' section surveying class. Cdt. Ward, E-E honor rep, testified that Gaines told him that a note of explanation was put on the paper (which had been turned in late) INVESTIGATION revealed that no such note exists, the statement was later denied by Gaines.

According to this statement, the Honor Committee heard evidence on three alleged lies; Gaines' statement of authorization to miss class on April 30 which was denied by Cpt. Hausman, Gaines' May 2 statement that he missed class because of a concrete field trip which four witnesses verified and Gaines' May 2 statement that he left a note on his late paper which Gaines later denied. Although the summary of testimony does not indicate that Gaines denied

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\* On the original the phrase "had done no such thing" has a single line drawn through it and the phrase "denied giving Gaines such authorization" is printed above it, thus substituting an allegation for a conclusion in conformity with the rest of the summary.

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the concrete field trip statement, he undoubtedly did so.

The printed form is filled in on the second page to reflect that the Committee charged Gaines with Violating the Honor Code in that "he did on or about 2 May at West Point attempt to deceive by lying". It is not clear whether this refers to the lie in class about the concrete field trip, the lie to another cadet about the note of explanation on the paper, both, or all three lies which grew out of the same incident, the missed class. What is clear is that the Honor Committee alleged that Gaines had violated the Honor Code which, if later determined to be correct, would lead to separation whether as a result of one breach or a dozen.

The report of the Honor Committee was routinely evaluated by the legal staff at West Point (A-18) and on May 14, 1975 a letter was sent to the Superintendent from the office of the Commandant (A-16) with the recommendation of the Commandant that a Board of Officers, convened pursuant to the Superintendent's authority in Article 16 of the Regulations for the United States Military Academy, was appropriate in this case. The letter states that on May 14 Cadet Gaines appeared personally before the Deputy Commandant, was informed that he was charged with violating the Honor Code, was informed that he had the right to counsel

and had the option of resigning or appearing before a Board of Officers which would be charged with making findings as to whether or not the Code had been violated. It is clear from the letter that, contrary to the assertions in appellants' brief, Gaines was counseled on the report from the Honor Committee which report gave evidence against Gaines of three separate lies.

The letter states that Cadet Gaines elected to have a Board of Officers. On May 28, two communications issued from the office of the Superintendent, Letter Orders Number 501 (R. 200) which authorizes the Board, names the members and charges it to "investigate and reach findings concerning such matters as may be referred to it", and Special Instructions to Board of Officers (R. 201), which particularized the charges which the Superintendent had determined required formal investigation and possible separation. Of the three alleged lies reported by the Honor Committee in its summary of testimony, two were referred to the Board.

The Board of Officers . . . will investigate and make findings . . . with respect to Cadet Keith D. Gaines . . . who is alleged to have violated the Cadet Honor Code in that he did, at West Point, New York, on or about 30 April, 1975, lie, by stating to Cadet Richard Anderson that he

had been excused from attending his surveying class by his instructor, Captain William Hausman, when in fact, he had not been so excused, and on or about 2 May 1975, lie by stating to Captain William Hausman that he was on a concrete class field trip on 30 April 1975 when in fact, he was not. (R. 201)

Rather than adding a charge to the Report of the Honor Committee, as claimed in appellant's brief, the Instructions to the Board eliminated one of the Cadet Committee charges.

Accordingly, by letter dated May 29, 1975 (R. 204), Gaines was given formal notification of the convening of a Board of Officers, his rights with respect thereto and the charges and witnesses the government intended to call. The charges were quoted verbatim from the Special Instruction to Board of Officers set forth above. Although there is normally a two week period between the notification to the Cadet and the date of the hearing, Gaines waived this period and proceeded to the hearing the next day, May 30, 1975 (R. 64). Counsel for plaintiff then stated that he had had sufficient time to prepare the case (R. 65).

The hearing commenced at 9:00 A.M. on May 30 and continued all day until 8:00 P.M. when the Board announced its findings. (R. 45, 198). The government called nine witnesses and Cadet Gaines called three including himself. (R. 42) Gaines testified twice, prior to and after his

other two witnesses. He offered defense to both the April 30 and the May 2 allegations. The Board also heard opening statements and summations by each counsel.

Only two portions of the proceedings are relevant to the action herein; the motion by Gaines' counsel at the hearing to dismiss the allegation of a lie on April 30 made to Cadet Anderson, which the Board denied, and the voir dire of Captain Hayes.

Following the voir dire and prior to the testimony, counsel for Cadet Gaines moved to dismiss the allegation that Gaines had lied to Cadet Anderson on April 30 (R. 65). He argued that it was not properly before the Board because of the finding on the back of the Honor Code Committee form which referred only to May 2 as a date. The Recorder, which is the term for the attorney presenting the evidence of violation, argued in opposition to the motion that this was a de novo proceeding, that the Board was convened solely on the authority of the Superintendent and was bound by the directions of the Superintendent, and that nowhere in the regulations is there any reference to a finding by the Honor Code Committee as a prerequisite for a finding by the Board. Indeed, he argued, there is no reference in the regulations to the Honor Code Committee at all (R. 66-8).

The Board recessed to consider the question and determined that they were bound by the orders they had been given by the Superintendent (R. 68). Accordingly, they denied the motion (R. 68).

Gaines' Counsel gave no indication whatsoever that he was unprepared to defend Gaines on the April 30 allegation.

The relevant voir dire of Captain Hayes is set forth as follows:

RC: (Gaines' Counsel) Does the fact that the cadet honor committee has obviously acted on this case have any effect on your decision?

CPT. HAYES: No. (R. 57).

\* \* \*

RC: Did you ever turn anyone in on an honor violation as a cadet?

CPT HAYES: Yes, I have.

RC: Were those allegations sustained by the cadet honor committee or - - -

CPT HAYES: I've had some of both.

RC: Was there any resentment on your part when it was not sustained?

CPT HAYES: No.

RC: Would you have resented it had the cadet honor committee found an individual and the board of officers acquitted him? (R. 58)

CPT HAYES: No.

RC: Were you ever aware of any resentment in your company concerning - - -

CPT HAYES: Of an officers board reversing a - - -

RC: Right.

CPT HAYES: I never had a particular cadet in my company who appeared before an officers board. I've had cadets in the regiment but I'm not aware of any resentment on the part of the cadets.

RC: You stated that - - - you used the phrase of an officers board reversing the honor board. So then you do feel like there is some weight to be attached to the honor board proceedings?

CPT HAYES: Oh, yes, certainly. I think there has to be a certain amount of weight attached to it in the sense that the cadets found the cadet --- The honor committee, in their estimation found the cadet guilty of violating the honor code. That does not have a particular impact on the proceedings that take place in an officers board, but --- And I've seen cases go both ways and generally speaking I never know one way or another why the case went whichever way it went. I had no real gut feelings on it.

RC: But you would say that the fact that he was found by the cadet honor committee is a consideration that would be in your mind today?

CPT HAYES: Well, I don't think you can --- if you were talking about the way that I would come up with a vote, no. But I think that a cadet would not appear before a board of officers if he had not been found guilty by the honor committee and, therefore, I say it has to have an impact of some sort, psychological or whatever. If it's a hard fact, cold fact, no.

RC: You would consider then that a vote to acquit today would be a reversal of the cadet honor committee determination?

CPT HAYES: Yes. (R. 59)

\* \* \*

REC: (Opposing Counsel) I have a question, please.

Captain Hayes, shortly I'm going to explain the regulation that will be used in conducting this particular board which is AR 16-6. I will also explain to you that this is a de novo hearing. In other words, it's starting anew as if nothing has gone on before which you must make a determination based on just what you hear today and not be influenced by anything else that may have gone on. Can you follow those instructions?

CPT HAYES: Right.

REC: Do you feel that because this has gone through other proceedings as Captain Bishop has brought up that you can put this out of your mind and base your decision today only on what you hear today? (R. 60)

CPT HAYES: Right.

REC: Then I take it the --- what the cadet honor committee has done will have no bearing on what you do today, is that correct?

CPT HAYES: Right.

REC: I have nothing further.

REC: But you would still consider a vote to acquit the cadet today would be to reverse the cadet honor committee?

CPT HAYES: Well, yes, I think you would have to say that but it's no different than any other proceeding that appears in a second step along the way. As for example in a leadership case, a Category II Leadership Committee is a totally different proceeding than what takes place in the Category I leadership proceeding. And whatever went on in the Category I is not even known to the board members. I do not know what went on at the honor committee. All I know is they obviously have voted guilty for the cadet to appear in this room. What went on there is immaterial in my mind to include their vote of guilty.

RC: I have no further questions.

PRES: I'd like to ask a question. Captain Hayes, your knowledge in this area is typical of that of almost any officer in the Department of Tactics?

CPT HAYES: Yes, Sir.

PRE: And you feel in spite of this knowledge you could make a mature judgment on this board at this time?

CPT HAYES: Yes, Sir.

RC: I have no further questions. (R. 61)

The counsel for Cadet Gaines then challenged Capt. Hayes for cause because of "the discussion that we had in here concerning his reliance on the cadet honor committee and his belief in the nature of this proceeding as it relates to that of the cadet honor committee." (R. 62)

The President of the Board of Officers recessed

the proceedings to consider the challenge and then rejected it citing paragraph 5 of Army Regulation 15-6, published at 32 C.F.R. 519.1(e), which sets the standard for challenge to a member as whether or not he can impartially participate in the investigation. (R. 62)

Another Board member, Major Devanney, testified on voir dire that he was unaware of the determinations, if any, of the honor code committee. (R. 54)

POINT I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION FOR A PRELIMINARY INJUNCTION FOR FAILURE TO DEMONSTRATE A PROBABILITY OF SUCCESS ON THE MERITS

A preliminary injunction is an extraordinary remedy, the granting of which lies within the discretion of the trial court. Decker v. Independence Shores Corp., 311 U.S. 282 (1940). Saunders v. Airline Pilots Association, 473 F.2d 244, 248 (2d Cir. 1972). Such a drastic remedy should not be granted in the absence of a clear showing by movant that he will probably be successful or that there is a serious question on the merits. Stamicarbon, N.V. v. American Cyanamid, 506 F.2d, 532, 536 (2d Cir. 1974). As the District Court reviewed the merits of appellant's claims as raised in his moving papers and found that there was little likelihood of ultimate success on those claims, the motion for a preliminary

M-1015 injunction pending final resolution of the proceeding was properly denied.

A. The Cadet Honor Committee

This argument is an outgrowth of a recent Second Circuit determination concerning the due process which must attend proceedings by which a cadet is separated from West Point. Andrews v. Knowlton, 509 F.2d 898 (2d Cir. 1975). In Andrews, this Court faced a broad due process challenge to precisely the same legal procedures as were utilized herein. Cadet Andrews had been brought before an Honor Code Committee which found a valid allegation against him for violation of the Honor Code. The Superintendent then convened a Board of Officers to investigate the allegations which the Superintendent referred to it. The Board found him guilty of the charges following a hearing at which Andrews was afforded precisely the same procedural safeguards as were provided to Cadet Gaines. These procedures were found to satisfy due process and are not challenged here. 509 F.2d 898, 905. See also, Hagopian v. Knowlton, 470 F.2d 201 (2d Cir. 1972) and Dunmar v. Ailes, 348 F.2d 51 (D.C. Cir. 1965).

What is challenged here is the relationship between the Cadet Honor Committee and the Board of Officers proceedings.

Gaines argues that the Cadet Committee found that there was validity to only one allegation of an Honor Code violation in his case, the May 2 lie, and that the Board of Officers was therefore restricted to hearing proof only as to that one violation. In view of the Board's finding that Cadet Gaines had lied on May 2, separation would have resulted for Gaines even if he had been before the Board on only that charge. However, he argues, the Board's proceedings were tainted by prejudice in that they considered evidence of a charge which Gaines argues he had been "acquitted" on by the Cadet Committee.

The controlling decision of Andrews does not support this contention. This Court in Andrews found that the Cadet Committee proceedings did not have sufficient importance to the process of separation from the Academy such as to warrant the imposition of due process on its operation:

While it is clear that the proceedings before the Cadet Honor Committee were wholly lacking in procedural safeguards, we are unpersuaded by the record now before us that the Cadet Honor Committee hearing was a critical stage in the separation of appellants from the Academy for Honor Code violations. There is no evidence in the record that the

decisions by the Cadet Honor Code Committee in any way influenced the members of the Board of Officers. On the contrary, the record convinces us that the proceedings before the Board of Officers were *de novo* and were as free from infection and taint as is a trial in which jurors are aware that the defendant before them has been indicted by a grand jury. We find, therefore, that the Cadet Honor Committee is a charging body whose decisions had no effect other than to initiate *de novo* proceedings before a Board of Officers.

509 F.2d 898, 907.

It is the Court's analogy to a grand jury which results in the claim herein, a claim which appellant is unable to otherwise substantiate and which is clearly contradicted by the applicable regulations and the finding of the Andrews court.\*

Nowhere in the regulations governing the separation proceedings is there even any reference to the Cadet Committee. On the contrary, it is clear that only the Superintendent of the Academy has the authority to convene Boards of Officers, 10 C.F.R. 519.1; Regulations of the United States Military Academy, Article 16. It is equally

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\* See also Birdwell v. Schlisinger, 403 F. Supp. 710 (D.C. Co.. 1975), where the Air Force equivalent of the Cadet Honor Committee specifically acquitted Cadet Birdwell on two out of three charges, which was followed by a Board of officers conviction on all three charges. Nevertheless, the Court found no violation of due process.

clear that the Board has only the authority which has been delegated to it by the Superintendent, 10 C.F.R. 519, Regulations of the United States Military Academy, Article 16.

It is undisputed that the practical result of a report from the Cadet Honor Committee of an alleged violation is an investigation by the legal staff of West Point.

This investigation is itself de novo, inquiring into all aspects of the questions raised in the Cadet Committee. A report is then made to the office of the Superintendent, who, in his discretion, determines whether or not to convene a Board of Officers and on what charges. Regulations of United States Military Committee, Article 16, R. 36. It is contrary to common sense as well as the clear line of authority in the Department of the Army to assert that the committee of cadets at the Army training academy could act in such a way as to limit the exercises of discretion of the Superintendent of the Academy. Andrews v. Knowlton, 509 F.2d 898, 905.

Pursuant to the applicable regulations, the Superintendent may initiate the separation proceedings on any basis within the limits of his discretion. The practice of referring allegations to the Cadet Committee is a matter

of the training function of the Academy, rather than one of attending to the provision of due process for separation procedures. The committee provides the function of instilling both self-discipline and the exercise of responsibility in future Army officers. Speaking of a similar situation at the Merchant Marine Academy, the Second Circuit stated:

Few decisions properly rest so exclusively within the discretion of the appropriate government officials than the selection, training, discipline and dismissal of the future officers of the military and Merchant Marine. Instilling and maintaining discipline and morale in these young men who will be required to bear weighty responsibility in the face of adversity - at times extreme - is a matter of substantial national importance scarcely within the competence of the judiciary. And it cannot be doubted that because of these factors historically the military has been permitted greater freedom to fashion its disciplinary procedures than the civilian authorities.  
Wassan v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967).

Nor can this result be affected by any procedures which have been developed by the cadets in the operation of their committee. The Cadet Honor Committee each year determines its own procedures following the guidelines set down by the Superintendent. The Court in Andrews clearly held that these cadet procedures do "not create legally binding rights or obligations." 509 F.2d 898, 905.

Nor do the particular facts of appellant's situation support the legal questions he is raising. The Report of the Cadet Committee, A-14, 15, shows clearly on its face that the Committee heard evidence of three different lies. They reported that there was validity to the allegation that Cadet Gaines lied on May 2. Two of the lies, the lie to Capt. Hausman and the lie about the note of explanation on the late paper occurred "on or about May 2".

Further, all three of the lies considered concerned one incident, Gaines failure to attend class. The Cadet Committee, knowing that only one violation is necessary to invoke separation, could have believed that it was unnecessary to specify charges beyond the statement that a violation was alleged to be valid.

Nor is there any evidence in the Record of the proceedings before the Board which supports Gaines' allegation that he was prejudiced by the findings of the Honor Committee. The Board clearly believed its starting reference to be the Special Instructions from the Superintendent (R. 200-201) and not the cadet proceedings. (R. 64) The Honor Committee report was placed into evidence by Gaines himself, R. 65, and not by the Government. Indeed, one of the Board members, Major Devaney, responded at voir dire that he did not know what the result of the cadet proceedings had been.

The Andrews Court dealt with the allegation that the members of the Board of Officers were prejudiced by the findings of the Cadet Honor Committee by pointing out that in the 1973-74 academic year five out of ten violations reported by the Cadets were not found valid by the Boards of Officers which investigated them. Andrews v. Knowlton, 509 F.2d 898, 906. The affidavit of Major Shimek showed that the same proportion resulted from the 1974-75 academic year, violations being found in only seven out of fifteen proceedings. Two of these were subsequently disallowed by the Superintendent.

Equally unsupported by the record is Gaines' contention that he was prejudiced by the Board's consideration of two allegations instead of one. The May 2 allegation, which Gaines concedes was properly before the Board, was supported by the evidence of four eye witnesses, the class instructor and three class members. It required no prejudice for the Board to make an adverse finding on that charge. Similarly, the disputed April 30 allegation was supported by two eye witnesses, one of whom was Gaines' own roommate. The case against Gaines hardly relied on pre-judicial inference.

While the Cadet Honor Committee is, as part of the officer training received by the cadets, a vital part of the functioning of the United States Military Academy, it is, as a legal matter, irrelevant to the process of separation from the Academy which the Courts have determined warrants due process. That process of separation commences with the determination of the Superintendent, in his discretion, that a Board of Officers is appropriate and continues with a de novo hearing before the Board, a review by the Superintendent following an opportunity by the Cadet to file a brief or other statement and final review by the Secretary of the Army. Gaines cannot and does not complain of any lack of due process in that procedure and must fail in his challenge to the result.

B. The Members of the Board of Officers

The Andrews Court faced the argument that all Boards of Officers were inevitably prejudiced by the findings of the Cadet Honor Committee. This argument was offered as support for Andrews' contention that due process must attach to those cadet proceedings. In holding that no due process was necessary at the Cadet committee level, the Court rejected the argument of prejudice on two grounds; the record disclosed no evidence of prejudice on the voir dire of the member officers and the statistics, discussed supra, which showed that in the 1973-74 academic year, the

Boards of Officers had failed to find violations in half of the situations in which the Cadet committee had reported them. As the record herein is the same on both points, Gaines' allegation of prejudice must also be rejected.

Andrews v. Knowlton, 509 F.2d 898, 906-7.

In the 1974-75 academic year, Boards of Officers rejected approximately half of the Cadet committee findings, the same proportion as the previous year mentioned in Andrews. Thus the only question left under Andrews is the replies of the challenged officer on voir dire.

Appellant overreaches in attempting to find prejudice in the answers of Capt. Hayes to the questions put to him on voir dire by his own counsel. Capt. Hayes commenced his testimony by clearly and unambiguously stating that he would not be affected by the fact that the Cadet committee had acted. He later stated that he could consider the evidence de novo and would not be influenced by anything other than the evidence put forward in the hearing. He stated that he could put all other proceedings out of his mind and that the Cadet committee proceedings would have no bearing on his decision. There could not be a more complete statement of a lack of prejudice from the Cadet committee results.

Gaines bases his argument on two other Hayes' statements; that a Cadet would not appear before a Board of Officers unless the Cadet committee had found him "guilty" and that he felt that a vote by him to acquit would be a vote to "reverse" the Cadet committee. Hayes also stated that he had never experienced or encountered any resentment from Cadets when the Cadet committee was "reversed."

There is simply no way that these statements can be read as amounting to a prejudice on the part of Capt. Hayes. That his acquittal would be in his mind a reversal of the Cadet committee is of no significance whatsoever, particularly in view of his statement that he did not expect to encounter Cadet resentment as a result of such an action. As Capt. Hayes said, he considered the Committee one step in a process that had more than one step. His statement that the Cadet committee would have to have found the Cadet guilty for the Cadet to be before the Officer Board is equally lacking in significance. As the Andrews Court analogized, all jurors are aware that a grand jury has made a charge concerning a defendant and yet that is not considered as amounting to prejudice. 509 F.2d 898, 907.

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The judicial process, taken after administrative fact-finding, does not lightly accept a challenge to the fairness of the hearing officer. See: Lopez v. Henry Phipps Plaza South, Inc., 498 F.2d 937 (2d Cir. 1974). Nor is judicial inquiry into the mental processes of the hearing officer favored. See: National Nutritional Foods Ass'n v. Food & Drug Administration, 491 F.2d 1141 (2d Cir. 1974). The challenge to Capt. Hayes is without merit.

C. Gaines Three Year Obligation For Active Service

Gaines has here raised for the first time an objection to his obligation for three years of active duty in the Army on the grounds that it is unduly harsh and that it was imposed arbitrarily. Neither objection has merit.

Anyone entering the Army from civilian status is obligated to serve six years of military service, whether active or reserve. 10 U.S.C. 651. Further, a cadet at the United States Military Academy who accepts a commission is obligated for five years of service after graduation.

10 U.S.C. 4348(a). If for any reason a cadet does not fulfill the requirements of completing the Academy and accepting the commission he is obligated for up to four more years of service after leaving the academy and is eligible for active duty.

10 U.S.C. 4348(b). Thus when Gaines entered West Point as a Cadet he was on notice that by statute, owed the Army, after he left the academy, five years of service if he was commissioned and up to four years if he was not.

Where failure to fulfill the requirements for a commission is the result of separation from West Point, precise standards have been promulgated for the extent of the military obligation so incurred. Regulation of the United States Military Academy, section 16.01.

A cadet who resigns or is separated from the academy prior to his third year at West Point will be discharged Section 16.0.(c). Commencing with the third year at the Academy, however, resignation or separation normally incurs an active duty obligation for not less than two years. Section 16.01(e).

Contrary to the arguments in Point III of appellants brief, the exception to the "not less than two years" obligation are specified as physical disqualification, unfitness or unsuitability, some of which are applicable to Gaines. Section 16.01(e). The section goes on to provide that the active duty requirement may be waived where "separation occurs as a result of deficiencies which are not considered willful..." Section 16.01(e)(2). Clearly, the Board of Officers finding that Gaines lied is a finding of a willful act.

When Gaines entered West Point, he knew he had the following obligations:

- 1) Five years of service following his Commission, 10 U.S.C. 4348(a)
- 2) Between two and four years of active service if he failed to achieve a commission but attended West Point for at least two years. 10 U.S.C. 4348(b), Regulations of United States Military Academy, Section 16.01(e).

By reason of his willful act, he failed to receive a commission after four years of education at West Point.

Thus, exactly as he could have foreseen, he now has an active duty obligation of three years. Where a cadet is on notice of the repercussions of his violation of the Honor Code, the imposition of the penalty does not violate due process.

Andrews v. Knowlton, supra, at 907-8.

Even if there were any validity to this argument it would not affect the propriety of the denial by the District Court of the motion for a preliminary injunction, the only issue now before this Court. The issues of the relief requested by plaintiff in his complaint are still pending before the District Court. The only issue that has yet been determined is that plaintiff has not thus far presented sufficiently viable arguments to merit the extraordinary relief of a preliminary injunction pending the final judgment. Garies remains free to build a record on this issue and present it to the District Court. He is even free to use it as a basis for a renewed motion for a preliminary injunction. Whatever the final outcome below, it is nevertheless clear that the issue as presented before this Court is not sufficiently probable of success as to require reversal of the District Court's exercise of discretion in denying the preliminary injunction.

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CONCLUSION

The denial by the District Court of plaintiff's motion for a preliminary injunction should be affirmed.

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Respectfully submitted,

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